IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2152 OF 2002
IN
SUMMARY SUIT NO.1607 OF 2001

Penta Cans. ..Plaintiff.

V/s.

Stella Industries Pvt.Ltd. ..Defendant.

WITH

NOTICE OF MOTION NO.2153 OF 2002
IN
SUMMARY SUIT NO.1608 OF 2001

Speciality Cans (India)
Pvt.Ltd. ..Plaintiff.

V/s.

Stella Industries Pvt.Ltd. ..Defendant.

Mr.Subodh Joshi i/b Rajendra Mehta for defendant(in support).

Ms.Sheetal Sampat i/b. M/s. K. Ashar & Co. for plaintiff.

CORAM: A.M.KHANWILKAR,J

DATE : MARCH 20, 2007.

P.C. :

1. This Judgment and Order will dispose of both the Notice of Motions as the facts are common and between the same parties.

2. By these Notice of Motions, the original defendant prays that the exparte decree passed against the defendant by this Court in the respective suits on 27th March, 2002 be set aside. The

affidavit in support filed alongwith the Notice of Motions asserts that the defendants were unaware that appearance was required to be filed within specified time with the Prothonotary and Senior Master, Original Side, High Court, Bombay. It is then stated that no Summons for Judgment was served upon the defendant company in the ordinary manner or registered post or otherwise. It is lastly contended that the matter was amicably settled between the parties. The defendants had agreed to pay total sum of Rs.2,35,000/- in relation to the claims in both the suits. This understanding was acknowledged in writing by the Director of the plaintiff on 24th March, 2000. Indeed, no reference is made to the writing in the reply, which is filed before this Court. But the said document has been placed on record which is at page 17 in Notice of Motion No. 2153 of 2002. The original copy of the said document was produced before the Court at the time of hearing. The plaintiffs have controverted the stand taken by the defendants in the affidavit in support of the Notice of Motion. The reply filed by the plaintiffs is one of denial.

3. After having considered the rival submission and going through the record, the first question is whether there are special circumstances, which would permit this Court to set aside the exparte decree

passed against the defendants on 27th March, 2002 as is required by the provisions of Order 37 Rule 4. In so far as first plea taken on behalf of the defendants that they were unaware about filing of appearance within specified time before the Prothonotary and Senor Master, Original Side, Bombay deserves to be stated to be rejected. That plea can not be reckoned to hold that it is a special circumstance to show indulgence to the defendants. However, I am inclined to accept the other stand taken on behalf of the defendants being plausible explanation that no Summons for Judgment was served on them in the ordinary manner or by registered post or otherwise. This Court however, proceeded to pass order on 27th March, 2002 on noting that the defendants were served. Indeed, the defendants were served with the suit, but what is relevant for our purpose is that there is no record brought to my notice that the Summons for Judgment in the suit was served on the defendants which is the specific grievance of the defendants. In addition, it appears that the defendants sent intimation to the office of Sheriff, Mumbai as well as to the advocate for the plaintiffs that they would enter appearance. Receipt of that intimation is not in dispute. In the said intimation, defendants have given address of service. No document is produced before me to show that after such intimation was received, any attempt was made by

the plaintiffs to serve the defendants on that address after 18th June, 2001. Besides, the claim of the defendants that the entire dispute was settled, which claim is supported by the documents purportedly executed and signed by the Director of the plaintiffs, which has now been placed on record, will have to be tested. The plaintiffs contend that the said documents pertains to the transaction between the parties for earlier period i.e. dated 24th March, 2000. Those aspects will be relevant for trial in the suit. Suffice it to observe at this stage that there are special circumstances, which according to me entitle the defendants for indulgence from this Court.

4. The next question is whether the defendant can be granted unconditional leave. It is not possible to accept that request of the defendants, even considering the claim of the defendants that the entire claim in both the suits have been settled between the parties in the sum of Rs.2,35,000/-. That is a matter for trial. From the stand of the defendants, it necessarily follows that the defendants have admitted the liability atleast to the extent of Rs.2,35,000/-. The defendants therefore, can be permitted to contest the suit claims only if they were to deposit the sum of Rs.2,35,000/- in the suit account.

5. My attention is drawn to the order passed by this Court on 6th November, 2003 in the respective Notice of Motions, whereunder the defendants have deposited sum of Rs.1,50,000/- in aggregate in both the suits. The defendants will have to deposit further sum of Rs.85,000/- in this Court within four weeks from today. In other words, the defendants are granted conditional leave to defend the suits on depositing total sum of Rs.2,35,000/- in both the suits together. The amount so deposited will be invested in appropriate Fixed Deposit initially for a period of one year. If the earlier investment has not matured, the same should be renewed to make its maturity date commensurate with the investment to be made from the further deposit of Rs.85,000/- to be paid by the defendants.

6. It will be open to the plaintiffs to take out appropriate application for withdrawal of the amount, if they are so advised, which will be decided on its own merits.

7. In addition, the defendants will have to be saddled with costs for the situation that has arisen and the plaintiff. In as much as the Plaintiff was forced to contest proceeding before this forum. The defendant shall pay costs to the plaintiff quantified

at Rs.5,000/- in each of Motion to be deposited in this Court within four weeks from today alongwith the deposit of amount referred to earlier.

8. Accordingly, both the Notice of Motion succeed on the following terms.

(i) The Judgment and decree dated 27th March, 2002 in the respective suits is recalled and set aside.

(ii) The defendants are gra conditional leave to defend on payment of Rs.2,35,000/- in aggregate in both the suits. The defendants shall deposit further sum of Rs.85,000/- in this Court, in addition to the deposit already made in terms of the order dated 6th March, 2003. The deposit shall be made within four weeks from today. The further amount deposited be invested in fixed deposit in a Nationalised Bank initially for a period of one year to be renewed, if required.

(iii) The defendants to pay costs of this Notice of Motion to the Plaintiff quantified at Rs.5,000/- in each Motion. Costs to be paid within four weeks from today.